

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHELLE BAZZETTA,

Defendant-Appellee.

UNPUBLISHED

January 3, 2003

No. 237756

Oakland Circuit Court

LC No. 88-086394-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was tried with her husband, Joseph Bazzetta, on a charge of open murder for the August 1, 1983, strangulation of Joseph's stepmother, Helen Bazzetta. Helen Bazzetta had been missing for almost five years when her body was discovered in a wooded area in Oakland County. The prosecution tried defendant on the theory that she aided and abetted Joseph in murdering Helen. The defense was based on the theory that, although defendant helped Joseph dispose of the body, she did not participate in Helen's death. Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and was sentenced to life imprisonment.

Defendant appealed as of right, claiming that her life sentence exceeded the sentencing guidelines' recommendation of eight to twenty-five years. This Court affirmed, finding that the sentence was not disproportionate to the circumstances of the offense and the offender. Ten years later, the parole board declined to grant defendant a public hearing. Defendant filed with the trial court a motion for relief from judgment on the grounds that her sentence was invalid because the trial court was operating under a misconception of the law when it sentenced her to parolable life. The trial court granted defendant's motion and ordered resentencing. The prosecutor filed an interlocutory appeal, and this Court granted leave to appeal and stayed the resentencing. We reverse the trial court's order and reinstate defendant's life sentence.

In this prosecutor's appeal, this Court is asked to determine the validity of the parolable life sentence that was imposed on defendant in November 1989, in light of the fact that the trial court, twelve years later, stated that the sentence was invalid. The court concluded that it operated under a misapprehension of the law in sentencing defendant because it did not know the parole board would consider a parolable life sentence the equivalent of a sentence of life without parole. We review this issue de novo because it essentially involves a question of law. See *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

According to MCR 6.429(B)(4), if a defendant is no longer entitled to appeal by right or by leave regarding the issue of correcting and appealing a sentence, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500. To be entitled to relief from judgment, it is necessary that a defendant demonstrate both good cause and actual prejudice as set forth in MCR 6.508(D)(3)(a) and (b). *People v Brown*, 196 Mich App 153, 158; 492 NW2d 770 (1992). MCR 6.508(D) permits a convicted defendant the opportunity to challenge a sentence even after an unsuccessful appeal of right. MCR 6.508(D) provides, in part:

The defendant has the burden of establishing entitlement to the relief requested.
The court may not grant relief to the defendant if the motion

* * *

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

* * *

(iv) in the case of a challenge to the sentence, the sentence is invalid.

Here, the prosecutor asserts that the elements of both good cause and actual prejudice were not met. Our review of the record shows that the question of actual prejudice is dispositive in this case.

Although the trial court unequivocally stated at the motion hearing that it was under a misconception of law when it imposed the parolable life sentence, a review of the sentencing transcript indicates otherwise. A resentencing cannot be validly ordered unless the initial sentence is invalid. *People v Robinson (After Second Remand)*, 227 Mich App 28, 37; 575 NW2d 784 (1997). As stated in *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), "Although the authority of the court over a defendant typically ends when a valid sentence is pronounced, the court may correct an invalid sentence after sentencing." "A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts." *Id.*, citing *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981).

Here, the sentencing transcript of November 21, 1989, shows that the trial court relied on the following in sentencing defendant: (1) the trial court found the crime that defendant committed was heinous; (2) the trial court believed that defendant willingly participated in the crime; (3) the trial court had questions regarding defendant's rehabilitative potential; (4) the trial

court intended defendant to remain in prison until that time when she could demonstrate to the parole board that she was rehabilitated and posed no threat to society; (5) the trial court recognized that the minimum sentence guidelines range of eight to twenty-five years might not prove effective in rehabilitating defendant; (6) the trial court was aware of the fact that only twelve of about 1,200 inmates serving a life sentence had been released on parole at the time; and (7) the trial court concluded a parolable life sentence would serve the trial court's intentions better. Accordingly, the trial court imposed a parolable life sentence.

However, ten years later, after the parole board decided not to grant defendant a public hearing, she claimed in her motion for relief from judgment that certain 1992 parole board policy changes have rendered a parolable life sentence the equivalent of a sentence of life without parole. Defendant argued that, as a result of the parole board policy changes, the bases upon which the trial court had relied in imposing defendant's 1989 sentence became a nullity.

At the October 24, 2001, hearing on defendant's motion for relief from judgment, the trial court stated:

. . . I believe that I can hold that I was operating under a misconception of law. I was quite clear what my thoughts were at the particular time of sentence. And what I feel [sic] that the defendant has shown good cause and actual prejudice. So I am going to have to say, based on that, that the sentence was basically invalid, based upon my understanding of the law and the facts at that time, and would resentence in connection with this matter.

* * *

It is interesting to observe that, at the recent Michigan Judges' Association Annual Judicial Conference, mandated by the Constitution, that the Michigan Department of Corrections and Office of Parole Board filed a great deal of material and statistics in connection with this whole concept, and they are very precise in saying that now, as to what we do and what our powers are, but they have specific language contained in that particular document emphasizing that, to them, life means life and that there is nothing to talk about. And that is not what I understood at the time I sentenced originally in connection with it and it would be unjust, as far as I'm concerned, to put the defendant in that position of jeopardy, and, therefore, that's the reasoning behind what I'm doing.

As the prosecutor aptly points out, the case law that existed at the time of defendant's sentencing demonstrates that the trial court was not under a misconception of law. Five years prior to defendant's sentencing, in *People v Waterman*, 137 Mich App 429, 438; 358 NW2d 602 (1984), this Court held that Proposal B, now MCL 791.233b, left intact the provisions of MCL 791.234 that provide that a defendant receiving a non-mandatory life sentence is eligible for consideration for parole once he has served a minimum of ten calendar years of his sentence. Here, the sentencing transcript shows that the trial court was cognizant of the fact that defendant would be eligible for parole consideration because the trial court pointedly explained that it was up to defendant to earn her parole release from the parole board.

In her motion for relief from judgment, defendant supported her argument by providing the trial court with transcripts of sentences and letters by other circuit court judges who, in the 1970s and 1980s, had imposed parolable life sentences on other defendants. However, in all these cases, the courts had imposed parolable life sentences with the intent that the defendants be released on parole after ten to fifteen years' imprisonment. Apparently, in those cases, the circuit courts imposed life sentences under the erroneous belief that a life sentence would make the defendants eligible for parole "sooner than a long term of years," as was the case in *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993). This is not the case here. The trial court was not under any false impression that defendant, who was convicted of second-degree murder, would be released for parole in ten to fifteen years. As previously noted, the trial court was cognizant of the fact that it could impose a minimum sentence within the guidelines range of eight to twenty-five years, but the trial court expressly opted not to impose such a sentence. Accordingly, the trial court was under no misapprehension of the law regarding the parole board policies that existed at the time the trial court sentenced defendant.

The next question is whether the alleged parole board policy changes of 1992 frustrated the expressed intent of the trial court, as stated on the record at the 1989 sentencing. Defendant has not offered any proof to show that parole is unequivocally denied to all those sentenced to parolable life for second-degree murder convictions. Instead, defendant showed that, during the year following the 1992 parole board changes, thirteen inmates were released on parole. Defendant also fails to show that the trial court was under any misapprehension about the fact that, in 1989, very few felons sentenced to parolable life for second-degree murder convictions were actually released on parole. On the contrary, the trial court had noted that only twelve of about 1,200 lifers had been paroled as of 1988. The sentencing transcript shows the trial court recognized the parole distinctions between an indeterminate sentence and a parolable life sentence, that the trial court questioned defendant's capability for rehabilitation, that the trial court questioned whether defendant could "earn" parole, and that the trial court made a conscious decision to disregard the minimum sentence guidelines recommendation of eight to twenty-five years. As previously noted, had the trial court intended that defendant be released in sixteen to twenty years, the trial court could have imposed a minimum sentence between eight and twenty-five years. Instead, the trial court stated that such a sentence would not serve the purposes of the punishment that defendant deserved.

Moreover, there is nothing to show that the parole board had ultimately decided not to grant defendant parole, and thus her claim is not ripe for consideration. See, generally, *People v Conat*, 238 Mich App 134, 145; 605 NW2d 49 (1999). Parole eligibility is governed by statute. MCL 791.234; *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999). A person serving a parolable life sentence is subject to the jurisdiction of the parole board after serving ten years in the case of a prisoner sentenced for a crime committed before October 1, 1992. *Johnson*, *supra* at 23. This means that such a defendant will be eligible for review by the parole board after serving ten years, not that she will be released. *Id.* All prisoners governed by MCL 791.234(6)(a) "shall" be interviewed by a member of the parole board after serving ten years and every five years thereafter without regard to the sentencing date. *Id.* at 24. Inmates are interviewed, but not necessarily eligible, for parole consideration at that time because several legal hurdles must still be overcome. *Id.* at 23-24. Here, defendant was only interviewed, the first of several statutory hurdles before she becomes eligible for parole consideration.

Accordingly, defendant's claim does not reflect an actual, existing controversy, as opposed to a potential one. *Conat, supra* at 145.

A review of the hearing motion transcript shows the trial court noted the rehabilitative achievements that defendant has made during imprisonment. Defendant has commendably pursued her higher education and obtained a Bachelor's Degree, magna cum laude. She successfully completed all recommended programs, and her conduct was exemplary. She became an HIV/AIDS counselor and was considered a role model in prison. It appears that the trial court was impressed, if not pleasantly surprised, by defendant's progress, and it appears that this affected the court's decision regarding defendant's motion for relief from judgment. In effect, the trial court improperly assumed the role of the parole board and determined that defendant had earned her parole. However, a trial court may not reevaluate its own discretionary sentencing and invalidate its sentences by simply changing its mind. See *People v Wybrecht*, 222 Mich App 160, 168-169; 564 NW2d 903 (1997). Moreover, the decision whether to grant parole is "discretionary with the parole board," see MCL 791.234(9), and is a function of the executive branch of government. Accordingly, the trial court erred when it allowed such considerations to influence its decision. In light of the above, the sentence was valid. The trial court improperly vacated defendant's sentence and improperly ordered resentencing.

Because defendant failed to show actual prejudice under MCR 6.508(D)(3)(b)(iv), as defendant's sentence is valid, we find it unnecessary to address whether defendant successfully showed good cause under MCR 6.508(D)(3)(a) for her failure to raise this issue in prior proceedings.

The trial court's order of October 31, 2001, is reversed, and defendant's initial sentence is reinstated. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Patrick M. Meter